ZEMINE DEVELOPMENT SDN BHD

v.

HONG KONG REALTY SDN BHD

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
WAN ADNAN MUHAMMAD JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: Q-02-455-07]
13 APRIL 2009

LAND LAW: *Caveats - Caveatable interest - Whether developer having caveatable interest after vendor's termination of development agreement - Whether caveat to remain pending outcome of developer's writ action for specific performance of agreement*

This was the appellant's appeal against the learned judge's dismissal of its application to remove the respondent's caveat on its land under s. 177 of the Land Code (Cap. 81) Sarawak ('Land Code'). The respondent had a pending writ action against the appellant as a result of the appellant's termination of a Development Agreement ('DA') executed between the parties. The respondent argued that it had a beneficial interest in the land by virtue of its 80% share of buildings as opposed to the appellant's 20% under the DA. As such, the *status quo* should be maintained until the trial of the writ action. The appellant argued that the DA was terminated as the respondent failed to obtain the requisite approval from the relevant authorities within the time frame required. Therefore, the respondent ceased to have any beneficial interest in the land to sustain the caveat.

Held (dismissing the appeal)
Per Sulong Matjeraie JCA delivering the judgment of the court:

(1) There was merit in the finding of the learned judge that the respondent's entitlement of 80% of the subdivided lots of the land gave the respondent beneficial interest in the land. The words "by virtue of any unregistered agreement or other instrument" in s. 173 Land Code were wide enough to encompass the DA. (para 25)

(2) The conflicting affidavits relating to the various issues raised by the appellant pertaining to the time frame, lapse of the DA and that it no longer subsisted ought to be tried and should not be disposed off by affidavit evidence. (para 26)

(3) The respondent succeeded in satisfying the court that it had a caveatable interest in the land. There was no error in law in the grounds of decision by the learned judge and therefore no interference was warranted. (para 27)

(4) The respondent successfully established a serious question to be tried. The caveat should remain intact on the balance of convenience to maintain the *status quo* pending the outcome of the writ action. (para 28)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu pemaju tanah terhadap keputusan yang arif hakim menolak permohonan responden pemilik tanah untuk mengeluarkan kaveat responden di atas tanahnya di bawah s. 177 Kanun Tanah (Cap. 81) Sarawak ('Kanun Tanah'). Pada masa yang sama, terdapat satu tindakan writ yang dimulakan oleh responden terhadap perayu yang menunggu keputusan. Tindakan writ tersebut dimulakan ekoran penamatan satu perjanjian pembangunan ('DA') oleh perayu yang dilaksanakan di antara kedua pihak tersebut. Responden menghujah bahawa ia mempunyai kepentingan benefisial ke atas tanah tersebut kerana diagihkan 80% daripada bangunan-bangunan berbanding dengan 20% yang diagihkan kepada perayu di bawah DA. Maka, *status quo* mesti dikekalkan sehingga perbicaraan tindakan writ. Perayu pula menghujah bahawa DA ditamatkan kerana responden gagal memperolehi kelulusan autoriti berkenaan dalam masa yang ditentukan. Maka, responden tidak mempunyai apa-apa kepentingan benefisial untuk mengekalkan kaveat tersebut.

Diputuskan (menolak rayuan)

Oleh Sulong Matjeraie HMR menyampaikan penghakiman mahkamah:

(1) Terdapat merit dalam keputusan hakim bicara bahawa pembahagian 80% yang diberi kepada perayu bererti ianya mempunyai kepentingan benefisial dalam tanah tersebut. Perkataan-perkataan "by virtue of any registered agreement or other instrument" in s. 173 Kanun Tanah cukup merangkumi DA.

(2) Afidavit-afidavit yang bertentangan berkaitan isu-isu yang dibangkitkan perayu berhubungan had masa, keluputan DA dan bahawa DA tidak boleh dikekalkan, sepatutnya dibicarakan dan tidak boleh ditentukan melalui keterangan afidavit.

(3) Responden berjaya menyakinkan mahkamah yang ia mempunyai kepentingan kaveat dalam tanah itu. Tiada kekhilafan undang-undang dalam alasan-alasan keputusan yang arif hakim dan dengan itu campurtangan mahkamah rayuan tidak diperlukan.

(4) Responden berjaya membuktikan bahawa terdapatnya persoalan serius untuk dibicarakan. Kaveat tersebut patut dikekalkan atas imbangan kesenangan bagi mengekalkan *status quo* sehingga penyelesaian tindakan writ tersebut.

Case(s) referred to:
Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 ***(refd)***
Mohamed Oki & Anor v. Lau Hieng Ming & Ors [1980] 1 LNS 153 ***(refd)***
Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1970] 1 MLJ ***(refd)***

Legislation referred to:
Land Code (Cap 81) (Sarawak), ss. 173, 177
National Land Code, ss. 327

For the appellant - Tai Choi Yu; M/s Tang & Tang
For the respondent - George Lim; M/s Battenberg & Talma

Repored by Usha Thiagarajah

JUDGMENT

Sulong Matjeraie JCA:

[1] This is the judgment of the Court.

[2] This is an appeal against the decision of the learned High Court Judge at Sibu, Sarawak who had dismissed, with costs, the originating summons of the appellant/plaintiff (appellant) for an order for the removal of caveat under s. 177 of the Sarawak Land Code (Cap. 81). We agreed with and affirmed the decision of the learned High Court Judge and have accordingly dismissed the appeal. Our reasons are as follows.

A **Brief Facts**

[3] The appellant, being the registered proprietor of all that parcel of land situate at Sungai Seduan, Sibu, containing an area of 22.983 hectares, more or less and described as Lot 1382 Block
B 11, Seduan Land District ('the said land'), entered into a development agreement ('development agreement') with the respondent/defendant ('respondent') on 9 May 1998 for the development of the said land. The respondent was formerly known as Vicspeed Sdn Bhd.

C **[4]** It was envisaged under the development agreement that residential and commercial buildings will be constructed on various subdivided sublots thereon.

[5] The development agreement confers, on a sharing basis, the
D appellant with 20% of the residential and commercial buildings approved by the authorities while the respondent shall retain the remaining 80% of the said buildings.

[6] Clause 17(1) of the development agreement confers the right
E of the respondent to lodge a caveat against the said land. Accordingly, the respondent lodged a caveat at the Sibu Land Registry Office on 23 June 1998 *vide* Instrument No. L6318/1998 ('the caveat').

F **[7]** Disputes arose between the parties hereto culminating in the termination of the development agreement and resulting in the respondent taking writ action ('writ action') for specific performance against the appellant. The said writ action is still pending before the High Court in Sibu, Sarawak.

G **Issue Before This Court**

[8] Whether the development agreement confers onto the respondent beneficial interest in the said land to sustain the caveat?

H **Decision Of Learned High Court Judge**

[9] The learned High Court Judge was satisfied that the respondent had successfully established a serious question to be tried and concluded that the balance of convenience laid in
I maintaining *status quo* to prevent, *inter alia*, scuttling the prospect of the respondent's pending writ action for specific performance.

Appellant's Contention

[10] Learned counsel for the appellant argued that since the development agreement has been terminated the respondent ceased to have any more beneficial interest over the land to sustain the caveat.

[11] He argued that the development agreement stipulates that the respondent shall apply for and obtain approval in principle in writing for the subdivision of the said land within a period of twenty-four (24) months from the date of the agreement which was 9 May 1998. Therefore such approval in principle should have been obtained by 9 May 2000.

[12] It was further argued that in the event that approval cannot be obtained within the stipulated 24-month period, then the development agreement, the Power of Attorney shall *ipso facto* lapse and be determined. The caveat shall also be withdrawn by the respondent at its own costs.

[13] Learned counsel for the appellant alleged that no such approval was forthcoming within the 24 months period. He conceded however that there was a letter dated 5 May 2000 from Jabatan Tanah dan Ukur, Bahagian Sibu, Sarawak (Lands & Surveys Department, Sibu, Sarawak) at p. 178 of the record of appeal but contended that approval was never obtained. It was a mere invitation to treat.

[14] This court notes however that the said letter seems to offer provisional approval for a period of three (3) months subject to payment of specified fees.

[15] It was also the contention of learned counsel for the appellant that this was a contractual interest provided for under the development agreement. He argued that once the respondent cannot perform and comply with paras 3(1) and 3(2) of the development agreement, para 3(3) shall apply.

[16] For easy reference para 3(1) of the development agreement provides as follows:

> The Developer shall apply for and obtain the approval in principle in writing for the subdivision of the said land within a period of twenty-four (24) months from the date of this Agreement.

[17] Paragraph 3(2) of the same provides:

> This Agreement and the Power of Attorney shall *ipso facto* lapse and be determined in the event that the Developer shall fail to obtain the approval in principle in writing for the subdivision of the said land within the said 24 months.

[18] Paragraph 3(3) provides:

> In the event the Agreement and the Power of Attorney are determined as provided in clause 3(1) and (2) hereof, the Developer shall at its own costs and expenses forthwith revoke the Power of Attorney and withdraw any caveat in respect of the said land …

[19] Based on the above, it was therefore the contention of the learned counsel for the appellant that applying para. 3(3) of the Development Agreement the respondent should have withdrawn the caveat and revoked the Power of Attorney when it failed to comply with para. 3(1) of the Development Agreement.

Respondent's Contention

[20] Learned counsel for the respondent on the other hand argued that the Development Agreement conferred beneficial interest in the said land on the respondent because of the "sharing basis" arising from the allocation of 20% of the sublots approved for the appellant and the remaining 80% to the respondent.

[21] As a result of the termination of the Development Agreement, it was argued that there was a genuine dispute culminating in the respondent taking a writ action for specific performance. This action is still pending before the High Court and as such it was argued that this court need only be satisfied, at this stage of the proceeding, that the respondent had shown that it had an interest in the said land to preserve the caveat and on a balance of convenience, *status quo* be maintained until the trial of the writ action.

Decision Of The Court

[22] In *Mohamed Oki & Anor v. Lau Hieng Ming & Ors* [1980] 1 LNS 153 HC, learned Tan Chiaw Thong J was of the view that the decisions in *Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1970] 1 MLJ 145 and *Eng Mee Yong & Ors v. Letchumanan*

[1979] 1 LNS 18 involving applications made under s. 327 of the National Land Code are applicable to applications made under s. 177 of the Sarawak Land Code (Cap 81). This is because it was his view that the provisions of s. 327 of the National Land Code are substantially similar to those in s. 177 of the Sarawak Land Code (Cap. 81). With respect we share his learned view. Indeed this instant application is made under s. 177 of the Sarawak Land Code (Cap. 81).

[23] Applying the test in *Eng Mee Yong*'s case, the onus is upon the respondent, as caveator, to satisfy the court that on the evidence presented to it his claim to an interest in the property placed under caveat does raise a serious question to be tried; and having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action by preventing the caveatee from disposing of his land to some third party.

[24] Additionally it is pertinent at this stage to consider the provisions of s. 173 of the Sarawak Land Code (Cap. 81) which deals with "Caveat against dealing". Section 173 stipulates:

> 173. Any person:
>
> (a) claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Code by virtue of any unregistered agreement or other instrument or any transmission, or of any trust express or implied or otherwise howsoever, …
>
> (b) …
>
> (c) …

may at any time lodge with the registrar a caveat in Form O in the First Schedule.

[25] Therefore it is the considered view of this court that there is merit in the finding of the learned High Court Judge that the entitlement of 80% of the subdivided lots of the said land constitutes the respondent's beneficial interest in the said land because of the words "by virtue of any unregistered agreement of other instrument" appearing in s. 173 thereof are wide enough to encompass the Development Agreement.

[26] We are equally satisfied that the respondent had successfully established a serious question to be tried. Further we are also of the considered view that the conflicting affidavits relating to the various issues raised by the appellant pertaining to time frame and proposition based on lapse and effluxion of time to sustain their assertion that the Development Agreement had lapsed and was no longer subsisting ought to be tried and should not be disposed off simply by way of affidavit evidence.

[27] For the reasons stated, we hold that the respondent has succeeded in discharging the onus placed in satisfying this court of its claim to a caveatable interest in the said land and consequently raised a serious question to be tried. We have read and re-read the grounds of decision of the learned High Court Judge and there is nothing to show that there was any error in law and does not therefore warrant interference.

[28] We find that there is a serious question to be tried and on the balance of convenience we are of the opinion that the caveat should remain intact to maintain a *status quo* pending the outcome of the hearing under appeal No. 22-05-01 at the High Court in Sibu, Sarawak, which will be heard very soon. This appeal is dismissed with costs. Deposit to the respondent towards account of taxed costs.